

Report 06-21 by the Committee on Standards of Conduct to the Senedd under Standing Order 22.9

March 2021



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About the Committee

The Committee was established on 28 June 2016. Its remit can be found at:
www.senedd.wales/SeneddStandards

Committee Chair:



Jayne Bryant MS
Welsh Labour

Current Committee membership:



Rhun ap Iorwerth MS
Plaid Cymru



Andrew RT Davies MS
Welsh Conservatives



David J Rowlands MS
Independent Alliance for Reform
Group

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1. Introduction

1. The terms of reference of the Standards of Conduct Committee (the Committee) are set out in Standing Order 22.¹ In accordance with functions set out in Standing Order 22.2 the Committee must:

“investigate, report on and, if appropriate, recommend action in respect of any complaint referred to it by the Commissioner for Standards.”²

2. This report is made to the Senedd under Standing Order 22.9 and paragraph 8.1 of the Procedure for Dealing with Complaints against Members of the Senedd³ (the Procedure).

3. This report sets out the details of the complaint and the way in which the Committee arrived at its recommendation.

¹ Standing Orders

² Standing Order 22.2(i)

³ The Senedd’s Procedure for Dealing with Complaints Against Members of the Senedd

2. Committee's Consideration of the Complaint

4. The Standards of Conduct Committee received a report from the Acting Commissioner for Standards (the commissioner) on 3 March 2021 in relation to a number of complaints made against a Member of Senedd in relation to their conduct on social media.

5. The complaints relate to the Member's use of social media to question the appropriateness of public affairs professionals posting on their private social media accounts comments which the Member regarded as politically partisan. Intrinsic to the complaint were claims that the member's conduct was unwanted and variously caused the complainants to feel bullied or harassed in contravention of the applicable Dignity and Respect policy. Conversely, the Member asserted their right to free speech and said the conduct was not unreasonable in the context of robust political discourse, particularly when directed at experienced public affairs professionals.

6. The Commissioner found that the complaints received were admissible, but having undertaken an investigation, further found there was no breach of the Code of Conduct.

7. The Commissioner concluded that:

“Having given careful consideration to these conflicting views and to the legal advice obtained I am satisfied that it cannot be said that the conduct complained of was not encouraged by the recipients. Those who are frequent users of Twitter do so in the almost certain knowledge that other users will respond by liking the original tweet, re-tweeting it or posting a further tweet of their own. They are implicitly seeking a response and should not be surprised when, on occasion, that response is not of their liking. I am satisfied that on a proper construction the actions of the [number deleted] recipients did, by the very nature of how this social media platform operates, encourage or invite the responses they received.”

8. He therefore concluded this was not unwanted behaviour on behalf of the Member and was not contrary to the Dignity and Respect policy.

9. The Commissioner went on to explain even if he considered it unwanted behaviour, that he would have been unable to uphold the complaints because:

“Section 6(1) of the Human Rights Act makes it unlawful for me to act in a way that is incompatible with a Convention right including the right to freedom of expression set out in ECHR Article 10. By giving publicity via a public medium such as Twitter to aspects of their ideas and beliefs by using the “like” facility the recipients should have been prepared to accept or tolerate close examination. Extending the ambit of “unwanted behaviour” to cover a response by a figure who is a member of the political class (in this case a Member of the Senedd) to such an expression of opinion that does not have egregious characteristics such as bullying, sexual harassment, discrimination or gratuitous offensiveness, would amount to an excessive restriction of the Member’s right to freedom of expression.

The right to freedom of expression can only be restricted when it is necessary for one of the reasons set out in Article 10.2. The only reason relevant to these complaints is that the restriction is necessary for the protection of the reputation or rights of others. Necessary has been interpreted by the European Court of Human Rights as not being synonymous with ‘indispensable’ but being of a higher order than expressions such as ‘reasonable’ or ‘desirable’. It is long established that a high status and protection is afforded to the right of freedom of expression and that any restriction of it requires clear words. It is also long established that for any restriction to be considered proportionate and necessary it must be the minimum possible to achieve the desired outcome, in this case the protection of the reputation and rights of others.

The only definition of unwanted behaviour in the Policy is that it is behaviour that is not encouraged or reciprocated by the recipients, regardless of whether it was meant to cause offence, and whether it is repeated or an isolated incident. I do not regard that definition as precise or clear. Giving the definition in the Policy a literal interpretation could lead to absurdities. For example, a man who holds a door open for a woman would have engaged in unwanted behaviour if the woman had not encouraged or reciprocated the door opening.

In *R. (on the application of Calver) v Adjudication Panel for Wales* Beatson J observed – “Notwithstanding the high importance of freedom of expression and its relative incommensurability with the interests that are invoked in justifying a restriction, the more egregious the conduct, the easier it is likely to be for the panel, and for the court,

to undertake the balancing that is required and justifiably to conclude that what was said or done falls within one of the exceptions to freedom of expression under common law, statute or the Convention. If the conduct is less egregious, it is likely to be more difficult to do this. This is because the interests—freedom of expression and, in the present context, proper standards of conduct by members of local authorities, are not easily commensurable.”

10. The Commissioner concluded that while it may not have been to best way for the Member to express concerns, that it could not be regarded as being in any way egregious.

11. Furthermore, he considers that:

“...the restriction purportedly imposed by the unwanted behaviour definition in the Policy is incompatible with the Article 10 right to freedom of expression. It would be unlawful for me to give effect to it by upholding the complaints on the basis of it.”

12. The complaint also alleged that the Integrity Principle had been breached. This sets out at paragraph 4.b of the Code that:

“...Senedd Members should at all times conduct themselves in a manner which will tend to maintain and strengthen the public’s trust and confidence in the integrity of the Senedd and should refrain from any action which would bring the Senedd, or its members generally, into disrepute.”

13. The Commissioner concluded that while these actions may have had an adverse impact on the Members reputation there is no evidence to suggest that it had any impact on the repute of Members generally or of the Senedd itself, and therefore it was not a breach of this principle.

The Committee considered the facts found in the Commissioner’s report, and agreed with the Commissioner’s finding that there has been no breach of the provisions of the Code of Conduct and Dignity and Respect policy identified.

14. The Committee notes that this is the third complaint received this Senedd about a Member’s conduct on social media. The Committee concluded in the previous cases that the language used was clearly offensive. However, this complaint relates much more to nuances around the etiquette on Social Media. As these methods of communication increase in use, complaints such as this are

important 'case studies' in establishing the boundaries of what is deemed acceptable. The conclusion of the report and this Committee is that Social Media is a place for robust exchange and expressing opinions, and that this should be expected by those engaging publicly on these platforms. However in doing so we reiterate the point of our previous reports that everyone using these platforms should engage in a manner which allows debate and the exchange of views in an appropriate and respectful manner.

3. Matters of general principle

15. The Procedure for Dealing with Complaints against Members of the Senedd requires the Committee to anonymise reports in those cases where a complaint has been ruled admissible but no breach has been found. The Committee concluded in this instance this was only achievable by reproducing the key sections of the report within this report.

16. The Commissioner highlighted that the complaints raised novel and complex legal issues about the correct interpretation of the Dignity and Respect policy and its compatibility with Article 10 ECHR, and that while he had the benefit of legal advice from within the Commission, the Member did not. When the Member approached the Commission's legal staff for advice they advised that they could not assist due to a potential conflict of interest. The Member then sought financial assistance through Members Business Support to obtain advice from the private sector, but the request was refused. As this relates to financial support for Members it is not a matter for the Committee.

17. The Committee notes that the Chief Executive and Clerk will consider how Members who are the subject of complaints involving novel and complex legal issues can be afforded access to appropriate legal advice, in consultation with the Commissioner for Standards and Chair of the Remuneration Board.

18. As outlined above, the Commissioner considers that the current Dignity and Respect policy lacks:

“...the precision that both those considering making a complaint and those who may be the subject of a complaint are entitled to expect from a document which could have such far reaching consequences. Definitions of the key words and phrases would enhance clarity. The lack of numbered paragraphs adds a further unnecessary obstacle for users. Whilst my findings on these complaints are fact specific it is apparent that the compatibility of the Policy with the ECHR, and in particular the Article 10 right to freedom of expression, requires further detailed consideration. I recommend that a comprehensive review of the Policy to ensure that it delivers the intended policy intentions in a manner compatible with the ECHR.”

19. The Committee notes that the policy was due to be reviewed after three years and work on this has been started by Senedd officials.

20. The Committee notes that the points raised by the Commissioner will be considered during the review of the dignity and respect policy considers and will take account of the revisions made to the Code of Conduct for Members of the Senedd.